Legal Update Article

Legislation Banning 'Captive Audience' Meetings Enacted in Minnesota, Awaiting Enactment in New York

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Minnesota will soon prohibit employers from requiring employees to attend political or religious meetings, including talks about labor unions. Additionally, similar legislation passed by the New York legislature will likely become effective shortly. Once in effect, the Minnesota and New York laws will ban employers in those states from mandating that employees attend meetings in which the employer attempts to dissuade employees from unionizing.

While such meetings (known as "captive audience" meetings) are protected employer speech under the National Labor Relations Act, these legislative measures are the latest attempts to override conduct specifically allowed by federal law.

Minnesota's law goes into effect August 1, 2023, with New York's will be taking effect on the governor's expected signature.

"Captive Audience" Meetings

More than 70 years ago, the National Labor Relations Board ruled in*Babcock v. Wilcox Co.,* 77 NLRB 577 (1948), that employers are permitted under the Act to hold captive audience meetings during union election campaigns to express their views on labor organizations.

Under the captive audience doctrine, an employer may hold mandatory employee meetings and may speak to employees about unionization. As long as they do not threaten, punish, or promise benefits to employees, these captive audience meetings have long been permitted under the Section 8(c) of the Act.

The captive audience rule is important for employers in communicating their message to employees, especially in view of the Board's strict regulation of employer speech. While union communications (which often include promises of greater benefits and higher wages) are largely unregulated during an organizing campaign, employers cannot make promises of improvements and are largely prohibited from discussing employee grievances. As a result, captive audience meetings have for decades been a staple of employers' taking part in election campaigns.

Minnesota and New York Restrictions

Minnesota

The statute restricts "employer-sponsored meetings or communication" relating to religious or political matters. It defines "political matters" as those relating to political parties and community, fraternal, or labor organizations, among other things.

Employers are prohibited from discharging, disciplining, or otherwise penalizing or

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Labor Relations

threatening to take adverse employment action against an employee for the following reasons:

1. Because the employee declines to attend or participate in an employer-sponsored meeting or declines to receive or listen to communications from the employer if the meeting or communication is to communicate the opinion of the employer about religious or political matters;
2. As a means of inducing an employee to attend or participate in meetings or receive or listen to those communications; or
3. Because the employee, or a person acting on behalf of the employee, makes a good-faith report, orally or in writing, of a violation or a suspected violation of the above.

Remedies for violations include reinstatement to the employee's former position, backpay, and attorneys' fees and costs.

New York

The legislation would make it unlawful for an employer to refuse to hire, employ, or license or to discharge or otherwise discriminate against an individual over terms of employment because of an individual's refusal to:

1. Attend an employer-sponsored meeting with the employer of which the primary purpose is to communicate the employer's opinion regarding religious or political matters; or
2. Listen to speech or view communications of which the primary purposes are to communicate the employer's opinion concerning religious or political matters.

Like the Minnesota law, the definition of "political matters" includes matters relating to labor organizations. Employers violating the statute may face civil penalties, along with damages and other equitable relief.

Federal Preemption

Upon Minnesota and New York's laws taking effect, four states will prohibit mandatory captive audience meetings: Connecticut, Minnesota, New York, and Oregon.

However, despite the states' moving to ban captive audience meetings, an ongoing issue remains: the Act preempts state law on such meetings. The U.S. Chamber of Commerce first initiated litigation over federal preemption after Oregon passed its law in 2010, but the litigation was dismissed based on lack of ripeness (that is, the case has not matured into a controversy warranting judicial intervention). The Oregon law survived a later lawsuit by the Board in 2020, based on lack of standing.

The U.S. Chamber is challenging Connecticut's law, asserting it is preempted by Section 8(c) of the Act and violates the First and Fourteen Amendments. The case is ongoing.

General Counsel Initiatives

Amid litigation targeting Connecticut's state-imposed ban, Board General Counsel (GC) Jennifer Abruzzo is advocating against captive audience meetings and similar

employer campaign conduct. For example, as part of her efforts to invigorate union organizing, GC Abruzzo issued a memorandum on April 7, 2022, (Memorandum GC 22-04) announcing she will argue that the Board should find employer captive audience meetings and related mandatory meetings violate the Act. Abruzzo argues that compulsory employee attendance under threat of discipline discourages employees from refusing to listen to employer speech (which Abruzzo views as inconsistent with the Act).

While the GC's office cannot effectuate such a change in Board policy unilaterally, the GC can advance cases and arguments before the Board that advocate for a change in the law in this area, a change the employee-friendly Biden Board may support. If the Board adopts the GC's proposal, employers will lose a primary vehicle for communicating their position — and employees would lose a significant opportunity to hear facts and opinions that differ from those presented by the union.

Takeaways

The Minnesota and New York legislation are the latest moves by union-friendly states hoping to circumvent the Act and upend established precedents. Although litigation is still pending regarding the legality of state bans on captive audience meetings, the Board under the Biden Administration has made clear it intends to follow a pro-labor agenda encouraging increased unionization. Nonetheless, states imposing bans on mandatory captive audience meetings face an uphill battle due to federal preemption and decades of Board precedent.

Employers subject to these state laws may need to consider whether it is in their organization's best interest to make meeting attendance voluntary or, instead, proceed in accordance with the Act. While the state laws will not prohibit employees from voluntarily attending such meetings, there is a risk that abandoning mandatory attendance requirements could limit crucial employer-employee communication channels that are protected under federal law.

Please contact a Jackson Lewis attorney with any questions.